

No. 15146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC
BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING ON BEHALF OF
APPELLANT, VIC BUONO.

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*To the Honorable Albert Lee Stephens, Dal M. Lemmon,
and James Alger Fee, Circuit Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellant Vic Buono presents this, his petition for a rehearing in the above entitled cause, and in support thereof, respectfully shows:

Preliminary Statement.

Appellant Buono was charged in an indictment with five counts of smuggling in violation of United States Code, Title 18, Section 545, and two counts of conspiracy of violation of United States Code, Title 18, Section 371. He was acquitted of one count of conspiracy and two counts of smuggling and was convicted of one count of

conspiracy and four counts of smuggling. He took an appeal from the judgment of conviction to this Honorable Court.

On his appeal Buono contended, and still contends, *inter alia*:

“Appellant Buono could not lawfully be indicted for nor convicted of the conspiracy purportedly charged in count seven of the indictment, in view of the failure of the Government to allege or prove facts which would support a conclusion that such purported conspiracy had any existence separate from the conspiracy charged in count four.” (Appellant Buono’s Op. Br. p. 14.)

No purpose would be served in setting out or summarizing at this point the arguments of appellant Buono in support of this contention. They are fully set forth in appellant Buono’s briefs. (Buono’s Op. Br. pp. 14-21, Buono’s Rep. Br. pp. 4-8.)

As against the foregoing contention of appellant Buono, the Government took the position that there were two separate conspiracies. (Appellee’s Br. p. 113.)

This Honorable Court affirmed appellant Buono’s conviction. The reasoning of this Honorable Court with regard to the foregoing contention of appellant is set forth in two paragraphs on pages 8 and 9 of the opinion. It is conceded, at least for the sake of argument, that the evidence showed but one integrated conspiracy. However, the Court based its conclusion that there was no prejudicial error upon two premises:

1. When a single conspiracy consists of several phases involving different persons, it is proper to charge those in one phase with one conspiracy and to use a separate

count to charge as co-conspirators all those in another phase.

2. If count seven had been stricken, appellant Buono would have been convicted instead of acquitted on count four. This Honorable Court cites no authority whatever in support of the foregoing propositions. The Court has not had the benefit of argument of the parties, either oral or written, as to their merits. Furthermore, it is respectfully submitted that, for the reasons hereafter set forth, the foregoing propositions are unsound.

Ground for Petition for Rehearing.

I.

The conclusion of this Honorable Court that the trial and conviction of appellant Buono of the conspiracy charged in count seven of the indictment did not result in prejudicial error, based upon reasoning the merits of which were not argued by the parties on appeal, is unsound and should be reconsidered by this Honorable Court after a full argument on its merits.

Argument.

The reasoning of this Honorable Court as to the matter under discussion is set forth on pages 8 and 9 of the opinion. It consists of the two propositions set forth above. Neither of these premises is sound. We shall discuss the unsoundness of each in turn.

1. When a single conspiracy consists of several phases involving different persons, it is proper to charge those in one phase with one conspiracy and to use a separate count to charge as co-conspirators all those in another phase. On its face this proposition appears to offer

several practical advantages. It would seem to prevent any particular defendant from being prejudiced by the introduction of evidence which is irrelevant as to him. Furthermore, it should result in a saving of time. No doubt it is these factors which made it appear reasonable and desirable to this Honorable Court. However, closer examination of the proposition indicates that it is likely to raise more difficulties than it will solve.

We take it that the fact that a conspiracy may be divisible into "phases" does not change the application to it of the definition of conspiracy contained in the federal statutes. Thus, a person is guilty of but one crime of conspiracy whether he participates in one "phase" or several "phases" of a single conspiracy. If no individual on trial is charged with participation in more than one "phase," no difficulty is presented. However, where a defendant is charged with participation in more than one "phase," the charging in multiple counts will create more difficulty and confusion than it can possibly eliminate. In the case at bar appellant Buono was charged with participation in two "phases." If, as appears to be conceded, there was but one conspiracy in the case at bar, appellant Buono must necessarily have been prejudiced, had he been convicted of both count four and count seven. In such a situation one of the convictions would have had to be reversed or otherwise expunged. Furthermore, had appellant Buono received separate trials on counts four and seven, and had count four resulted in acquittal, as it did in the case at bar, that acquittal must clearly have been a bar to a prosecution on count seven, since count seven related to the same conspiracy as count four. The trial together of the different offenses charged in several counts of an indictment is a proced-

jurial devise intended to increase the economy and efficiency of the courts. The proceedings are supposed to be handled in such a way that the defendant will have as fair a trial and the results will be no different than if he were tried on each count separately. Such a procedure certainly may not be used to deny to a defendant his fundamental constitutional right to be tried only once for a single offense. Yet, it is an inescapable practical fact that, had count seven been stricken as it should have been, or had the Government attempted to try appellant Buono on count seven after the acquittal on count four, appellant Buono could not have been convicted. It is obvious that when a defendant is convicted as a consequence of an error, but for which he could not have been convicted, then the defendant has been prejudiced by the error. This fact cannot be changed by all the logic, pure or otherwise, in the world.

2. If count seven had been stricken, the jury would have convicted appellant Buono of count four. This Honorable Court did not state this premise quite so explicitly as we have done. However, this is the upshot of the first paragraph on page 9 of the opinion. An explicit statement of the proposition should be sufficient refutation of it. Obviously, such a conclusion is usurpation of the province of the jury and beyond the power of this Honorable Court on appeal. Furthermore, it is incorrect.

The unlawful acts charged in counts four and seven were the same. Several persons were named as conspirators in both counts. The dates referred to in count seven, which of course were not binding upon the Government, were included within the time charged for

count four. Thus, all of the Government's evidence of conspiratorial activity by appellant Buono was admissible as to the charge in count four, as well as count seven. This Honorable Court may not properly conclude that the jury did not consider and reject all that evidence in connection with the charge in count four. To do so would be to presume error. Neither do we believe that it is the function of appellant Buono or of this Honorable Court to speculate as to the thinking of the jury. However, the conclusion of this Honorable Court is based in part upon such speculation. Therefore, we must offer our opinion as to the motivation of the jury in reaching its verdicts, for what bearing it may have upon the question of the prejudicial effect of the errors of the trial court.

We respectfully submit that the jurors did not believe the testimony of the admitted perjurers offered as witnesses by the Government. They did not rely upon such testimony for any of their verdicts. Appellant Duke was no doubt convicted because the jury was satisfied beyond a reasonable doubt from the manner of his conduct of his defense that he could not have associated for so long with the malodorous characters in the case without being guilty of the offenses charged in the indictment. They learned from reliable witnesses enough about appellant Ballard to reach the same conclusion as to him. However, the acquittal of appellant Buono on counts four, five and six indicates that the jury believed that appellant Buono could and did deal with the conspirators without becoming involved in their nefarious deeds.

There remains the question of why the jury convicted appellant Buono of count seven, and consequently of counts eight, nine and ten. In this connection it is obvious

hat to have reached the result it did the jury must have somewhere drawn a line between count four and count seven. If, as is conceded, count four and count seven are merely different "phases" of the same conspiracy, then this line has no existence in the eyes of the law. The reasoning of this Honorable Court assumes that the jury has correctly drawn the line. We submit that on theoretical grounds it is impossible to correctly draw a nonexistent line. As a practical matter we submit that the line was not drawn so as to make count seven a complete conspiracy. Count seven was referred to throughout the trial as "the airplane conspiracy." In connection with this matter reliable evidence established and appellant Buono testified that he aided some of the smugglers in obtaining an airplane. Buono's version was that he did so in order to aid the smugglers in entering a legitimate occupation, so that he could be paid some of the money they owed him. The smugglers said that he was a party to a conspiracy to smuggle. It is almost inconceivable that the jury would have believed this testimony of the smugglers, while rejecting their testimony connecting Buono with count four. Under the instructions of the court the jury was bound to conclude that count seven related to some evidence presented by the prosecution which was separate and distinct from that offered under count four. In attempting to draw this line, which as a matter of law did not exist, they may well have hewed too close to count seven and, as a result, have convicted appellant Buono of aiding some smugglers in buying an airplane. So doing would not, of course, constitute conspiracy in the absence of an intent on Buono's part that the airplane should be used for smuggling. Such a conviction would be erroneous. It is an error which

could reasonably be expected to stem from the error of the trial court in permitting the case to go to the jury on count seven at all. If the jury did decide the case on this basis, the conclusion of this Honorable Court that they would have convicted on count four had count seven been stricken is clearly erroneous. Its further conclusion therefrom that appellant Buono was not prejudiced by permitting his case to go to the jury on both counts four and seven is, therefore, also erroneous. A rehearing should be granted in order that this Honorable Court may have an opportunity to reconsider and reverse its decision as to appellant Buono.

Conclusion.

This Honorable Court has concluded that the trial court did not commit prejudicial error as to appellant Buono. That conclusion is based upon reasoning as to the merits of which there was no argument by the parties on appeal. Furthermore, appellant Buono respectfully submits that that reasoning is unsound.

Wherefore, appellant Vic Buono respectfully prays that this Honorable Court grant him a rehearing and that upon said rehearing this Honorable Court reverse the judgment of his conviction.

Respectfully submitted,

EDGAR G. LANGFORD,

RICHARD L. VAUGHN,

J. PERRY LANGFORD,

By J. PERRY LANGFORD,

Attorneys for Appellant Vic Buono.

Certificate of Counsel.

J. Perry Langford hereby certifies that he is one of counsel for appellant Vic Buono in the above entitled matter; that the foregoing petition for rehearing is in his judgment well founded; and that it is not interposed merely for delay.

Dated, this 10th day of September, 1957.

J. PERRY LANGFORD.

